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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1076

ERNEST C. PICKENS,
Petitioner,

vs.

ARTHUR L. OLIVER, Warden, California State Prison at Folsom,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On November 8, 1967, the California Supreme Court denied, without opinion, petitioner's application for a writ of habeas corpus. (*In re Pickens on Habeas Corpus,* Crim. No. 11,521.) The murder conviction which petitioner now places in issue was affirmed by the California Court of Appeal by an opinion filed on March 16, 1961. *People v. Pickens,* 190 Cal.App.2d

138, 11 Cal.Rptr. 795 (1961). Petitioner did not petition for a rehearing, nor did he petition the California Supreme Court for a hearing, nor did he petition this Court for a writ of certiorari to review the decision by the California Court of Appeal affirming his conviction.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under Title 28, United States Code section 1257(3).

QUESTIONS PRESENTED

I. Was the rule of evidence followed by California at the time of petitioner's conviction in 1959 which permitted the statement by his jointly tried codefendant and admissible only against him to be admitted in evidence under appropriate limiting instructions consistent with due process?

II. Should this Court respect the determination by the California Supreme Court not to give retroactive application to its subsequent adoption of a rule of evidence which now renders such statements inadmissible in a joint trial unless all parts implicating codefendants are effectively deleted?

STATEMENT OF THE CASE

On March 19, 1959, an indictment was filed in the Superior Court of San Francisco charging petitioner Ernest C. Pickens and Walter Senior with murdering

Charles Ackley on or about February 26, 1959. Both defendants entered pleas of not guilty. Following a five day trial, the jury found petitioner Pickens guilty of murder in the first degree and Senior guilty of murder in the second degree. On June 8, 1959, judgment was entered sentencing Senior to imprisonment for the term prescribed by law. The penalty phase of trial with respect to petitioner Pickens was heard on June 11, 1959. By stipulation of counsel the court discharged the jury and fixed his punishment at life imprisonment. Petitioner's motion for new trial was denied and on June 11, 1959, judgment was entered sentencing him to imprisonment in the state prison for life.

Petitioner appealed his conviction to the California Court of Appeal which on March 16, 1961, filed an opinion affirming the judgment. *People v. Pickens,* 190 Cal.App.2d 138, 11 Cal.Rptr. 795 (1961). Petitioner filed no petition for rehearing, nor did he petition the California Supreme Court for a hearing, nor did he petition this Court for a writ of certiorari to review the decision by the California Court of Appeal. Petitioner's codefendant Senior took no appeal from his conviction.

STATEMENT OF FACTS

The facts relating to the murder which led to the conviction which petitioner now challenges are set forth in the opinion of the Court of Appeal as follows:

> "The record reveals the following facts: On March 2, 1959, at about 8 a.m., the body of an

individual in his middle sixties, weighing approximately 180 pounds, was found in a grove of trees across from the Sharp Park Golf Course. The autopsy was performed at 1:30 p.m. on March 3, 1959, and it was estimated death had taken place from 30-48 hours earlier. The autopsy disclosed extensive trauma of the entire body. A 2-inch wide strip of the head had been shaved from the forehead to the back of the head. There were superficial abrasions and lacerations of the skin along the shaved strip and a slightly depressed abrasion about 1 inch in diameter on the right forehead. The eyes were swollen shut and discolored, evidencing hemorrhages; the nose was markedly distorted, showing a fracture of the nasal cartilage and was filled with dried blood. The upper lip had a cut through the entire lip and the lower lip showed a deep laceration. Both lips were covered with blood and covered with dirt—like material was on the tongue. There were numerous small bruises around the neck and shoulders and on the back, chest, left abdomen and hip and areas of discoloration about 1 inch in diameter, representing similarly inflicted types of injury, as well as breaks in the skin over the left hip and left thigh and similar injuries to the buttocks.

"The chest area showed a complete transverse fracture of the entire body of the sternum. As the sternum at the point of fracture is a little less than 1 inch thick, pressure in excess of 100 pounds is needed to cause a fracture. Such pressure may be caused by a kick from a horse, a body impinged on a steering wheel or by one person jumping on the chest of one lying prone. The rib cage was fractured on both sides and the

lungs were both lacerated by fragments of the fractured ribs.

"The coloration of the various bruises indicated that all were not inflicted at the same time, but it was clear that all of the injuries were inflicted before death. The county pathologist was of the opinion that the more recent bruises were inflicted 24 hours before death and the older bruises represented an additional 24 hours. The county pathologist also testified that this was the most severe infliction of injury by human intervention that he had ever seen and concluded that death had been caused by the numerous injuries described above, and that a person with such injuries would suffer severe pain and have great difficulty breathing and moving.

"On March 12, 1959, a gunny sack containing bloodstained clothing, including a belt with the name Charles Ackley on it, was found at Devil's Slide, south of the place where the body had been found. The body was identified as Charles Ackley.

"On March 11, 1959, Mary Maribo was picked up and booked as a drunk by police officers of San Mateo County; she knew the victim, Charles Ackley, who also lived at the Vincent Hotel on Turk Street in San Francisco. On Wednesday, February 25, 1959, the appellant, Pickens, and Senior helped her move from the Vincent Hotel to a room on 16th Street. The appellant lent her the money to pay the rent on her new apartment. As she couldn't move her trunk and other large items to her new home, the appellant took them to his home on Lee Street in San Francisco.

"The next day, Thursday, February 26, Mary saw Ackley about 11 a.m. on Valencia Street

with one Staley; Ackley was drunk and staggering. Mary called the appellant's wife, Wanda, to see if they were going to bring her trunk and things. Mrs. Pickens then invited Mary to come out and help put up some curtains at the Pickens home. The appellant and Senior picked up Mary in their truck about noon and took her to the Pickens home; they then left for a short while to get some groceries. They returned about 1 p.m. with the groceries and 2 fifths of wine. Mary told Wanda that Ackley had said Wanda had been a prostitute before her marriage. Wanda repeated this to the appellant, and apparently gave him the impression that Ackley had said that the appellant had held Wanda while Ackley had intercourse with her. Mary then repeated what she had said and told the appellant that Ackley had said other things about him in a bar. The appellant got very angry, called Ackley a dirty name, cursed, and threatened to make Ackley commit an indecent act with his dog. The appellant and Senior then left.

"They returned to the Lee Street home about 5 p.m. with Ackley and brought him into the house. Ackley's teeth were out of his mouth and his lips were bleeding. Th appellant pushed Ackley into a chair and asked him about the alleged statements. Ackley denied making the statements but the appellant said he knew Ackley had said them and slapped Ackley in the face. Ackley and the appellant slapped at each other until Senior entered and hit Ackley in the face. Ackley tried to defend himself but could not do very much against his two assailants. The two women left the room and could hear the sound of flesh hitting flesh.

"When Mary returned to the living room a short while later, Ackley was naked and lying on the floor. The appellant told her to kick Ackley in the groin, which she did. Wanda and the appellant also kicked him. The two women again left the room; when they returned, they noticed that Ackley's head had been shaved from his forehead to the back of his head, and he was sitting in a chair and asking the appellant and Senior to stop.

"The appellant went outside and came back with a large dog. Ackley said: 'no, no, no,' and the appellant said: 'Oh, yes' and then pushed Ackley's head between the dog's legs. Mary again left the room. When she returned, Ackley was lying on the floor with one eye closed and his entire face bloody and mashed up. The appellant and Senior were sitting on the davenport. As Ackley's blood was getting on the rug, they moved his head into the fireplace. There was blood on the floor from his nose, and feces on his body.

"About 9 p.m., Mary and Senior left in a cab; the appellant told her she hadn't been out there and advised her to say she hadn't seen Ackley that day. The next day, February 27, Mary called the Pickens home and the appellant told her Ackley was all right. He repeated his warning of the night before, i.e., that she didn't know anything about it and had not been there. That evening, Senior told Mary that Ackley was in the basement of the Pickens home and that he had put some clothes on him and given him coffee, wine and a pill and that he had cleaned up the Pickens living room. The following day, Saturday, February 28, Mary again spoke to Senior,

who told her that Pickens had said that Ackley had left. The next day, Sunday, March 1, Senior told Mary that he didn't know where Ackley was. On Monday, March 2, Mary read about the body found at Sharp Park. Senior came to her room and she said: 'My Lord, that was, that was Ackley's body out there'; he said: 'Yeah. Kid, the heat's on.' He told Mary to stay in her room and not go out in the bars and promised to bring her all she wanted to drink in her room if she did not go out in the bars or streets.

"On Saturday of the following week [March 7], the appellant came to Mary's room; Senior was there and all three went to the Pickens home. The appellant again told her to remember that she knew nothing about this and had not been there. He also told her that the last time she had seen Ackley was when she saw him with Staley [on the morning of the 26th]. Later, Senior told her he had tried to get rid of Ackley's clothing. Mary identified the clothing found at Devil's Slide, as the clothing Ackley had when he was brought to the Pickens home on February 26.

"Later, Mary went to a bar and was questioned by two officers. When she told Senior about this, he cursed, threatened and struck her. She called the appellant who told her that Senior would apologize, which he did.

"Lena Galli testified that on the afternoon of February 26, she saw two men force a man out of a car, beat him, and put him in another car, at 16th and Valencia Streets. Opal Fanning testified that about 4 o'clock that same afternoon, the appellant and Senior visited her and the appellant told her they would really take care of

Ackley; Senior told her: 'Me and Ernie are going to find Chuck [Ackley] and if Ernie [the appellant] is going to do any killing, I'll help him.'" 190 Cal.App.2d at 141-145

ARGUMENT

I

THE RULE OF EVIDENCE FOLLOWED IN CALIFORNIA AT THE TIME OF PETITIONER'S CONVICTION IN 1959 WHICH PERMITTED THE STATEMENT BY HIS JOINTLY TRIED CODEFENDANT AND ADMISSIBLE ONLY AGAINST HIM TO BE ADMITTED IN EVIDENCE UNDER APPROPRIATE LIMITING INSTRUCTIONS WAS AND IS CONSISTENT WITH DUE PROCESS.

During the joint trial which resulted in the conviction of petitioner and his codefendant Senior, the prosecution offered and the trial court admitted into evidence an extrajudicial statement by Senior. Prior to the playing of this recorded statement for the jury, the trial judge gave the following instruction:

> "Now, ladies and gentlemen, we're about to play the recording here of Walter Senior, one of the defendants. You will hear his voice in a few minutes, and also the other officers, but I wanted to instruct you, and very carefully on this, that this applies only to Walter Senior, that's the only defendant it applies to—whatever he says, whatever the testimony is recorded here—and it does not apply to the other deefndant, Mr. Pickens, because he was not present, he was not a party to this recording. Do you understand that?
>
> "Very well." (RT 131:16-25.)

Subsequently, during the formal instruction of the jury prior to the time when they retired to deliberate on the case, the court gave this additional instruction:

> "When evidence has been received as to one of the defendants but is not received as against the other, the jury may consider such evidence only as against the defendant against whom it was permitted to be received. It may not be considered by the jury for any other purpose or against any other defendant." (RT 324:5-9.)

One of the issues raised by petitioner on the appeal from his conviction was an assertion that he had been denied due process of law by the admission into evidence over his objection of Senior's statement. Apropos to the argument he now presents to this Court, the Court of Appeal in its discussion disposing of his contention stated:

> "Appellant now argues that this statement was not a confession or admission by Senior but a self-serving statement and an accusation against him, and seeks to bring himself within the rules of the coerced confession cases. There is no question that under the circumstances outlined above, evidence of a confession or admission by one of several codefendants is admissible under proper instructions limiting its consideration to the declarant, even though such evidence includes statements which tend to incriminate the codefendants. (*People v. Turville, supra; People v. Chavez,* 50 Cal.2d 778 [329 P.2d 907]; *People v. Martinez,* 19 Cal.App.2d 599 [66 P.2d 161].) The few cases to the contrary presented very unusual circumstances: In *People v. Zammora,* 66 Cal.App.2d

166 [152 P.2d 180], there were 22 defendants; in *People v. Foote,* 48 Cal.2d 20 [306 P.2d 803], the statement lasted four hours, so that the court concluded that the statements were irrelevant and unnecessary and might confuse the jury under the circumstances." *People v. Pickens, supra,* at 148.

After the affirmance of his conviction on March 16, 1961, petitioner did not further pursue this issue until September 21, 1967, when he filed his petition for writ of habeas corpus with the California Supreme Court, the denial of which he now asks this Court to review. Prior to the time he filed his petition, the California Supreme Court had decided *People v. Aranda,* 63 Cal.2d 518, 47 Cal.Rptr. 353, 407 P.2d 265 (1965), in which it adopted a rule of evidence precluding the prosecution from introducing into evidence during a joint trial an extrajudicial statement by one defendant unless all parts of the statement implicating any codefendants are effectively deleted. In the points and authorities in support of his petition to that court, he argued: "A defendant who invoked the *Aranda* rule in the trial court should be entitled to its retroactive application."

Petitioner now asks this Court to impose upon the various states as a constitutional standard a rule of evidence which this Court in carrying out its supervisory role over the federal courts has not seen fit to impose upon them. Furthermore, in the procedural posture in which this case arises petitioner asks not only that this rule of evidence be adopted as a constitutional standard but that it be given retroactive effect.

We submit that his arguments must be rejected since the rule followed in California at the time of his conviction which permitted the statement by his jointly tried codefendant to be admitted in evidence under appropriate limiting instructions was and is consistent with due process. Not only is it consistent with due process but it conforms to the rule of evidence consistently sanctioned by this Court in its supervisory role over the federal courts.

This Court acting in that capacity has consistently sanctioned and adhered to a rule of evidence which permits an extrajudicial statement admissible only against the declarant to be used in a joint trial when appropriate limiting instructions are given. In *United States v. Ball,* 163 U.S. 662, 672 (1896), this Court stated:

> "It does not appear that there was any abuse of that discretion in ordering the three defendants to be tried together, or that the court did not duly limit the effect of any evidence introduced which was competent against one defendant and incompetent against the others. See *Sparf v. United States,* 156 U.S. 51, 58. On the contrary, upon the offer by the United States of evidence of declarations made by Millard F. Ball after the killing and not in the presence of the other defendants, and upon an objection to its admissibility against them, the court at once said, in the presence of the jury, that, of course, it would be only evidence against him, if he said anything; and the court was not afterwards requested to make any further ruling upon this point." 163 U.S. at 672.

In *Opper v. United States*, 348 U.S. 84, 95 (1954), this Court reiterated its approval of this rule of evidence in these strong terms:

> "The trial judge here made clear and repeated admonitions to the jury at appropriate times that Hollifield's incriminatory statements were not to be considered in establishing the guilt of the petitioner. [Footnote omitted.] To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions."

In *Delli Paoli v. United States*, 352 U.S. 232 (1957), this Court once more adhered to and approved of this rule of evidence. In doing so, it noted:

> "It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice." 352 U.S. at 242.

In support of our assertion that the rule of evidence followed by California at the time of petitioner's conviction is consistent with current federal practice,

we consider it pertinent to point out that the former California rule was subject to limitations and did not afford a blanket sanction for the use of such statements under any circumstance. In *People v. Foote,* 48 Cal.2d 20, 23, 306 P.2d 803 (1957), the California Supreme Court articulated these limitations as follows:

> "Where, however, statements of a codefendant are admitted which are irrelevant or unnecessary in establishing a case against him and are extremely prejudicial and inadmissible hearsay as to a codefendant, they should be excluded from evidence." *See also, People v. Chavez,* 50 Cal.2d 778, 790, 329 P.2d 907 (1958); *People v. Zammora,* 66 Cal.App.2d 166, 211-12, 152 P.2d 180 (1944).

These limitations place the then prevailing California rule of evidence in clear conformity to current federal practice. As this Court noted in *Delli Paoli:*

> "There may be practical limitations to the circumstances under which a jury should be left to follow instructions but this case does not present them. As a practical matter, the choice here was between separate trials and a joint trial in which the confession would be admitted under appropriate instructions. Such a choice turns on the circumstances of the particular case and lies largely within the discretion of the trial judge." 352 U.S. at 243.

Petitioner, in an argument suggested by *People v. Aranda,* 63 Cal.2d 518, n.7 at 529, 47 Cal. Rptr. 353, 407 P.2d 265 (1965), argues that *Delli Paoli* appears overruled by implication by this Court's holding in

Jackson v. Denno, 378 U.S. 368 (1964). We find this argument more than answered by this Court in *Spencer v. Texas,* 385 U.S. 554 (1967). We find particularly pertinent in this regard the following language in *Spencer.*

> "To say the United States Constitution is infringed simply because this type of evidence [evidence of past convictions for sentencing purposes] may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence. For example, all joint trials, whether of several codefendants or of one defendant charged with multiple offenses, furnish inherent opportunities for unfairness when evidence submitted as to one crime (on which there may be an acquittal) may influence the jury as to a totally different charge. See *Delli Paoli v. United States,* 352 U.S. 232; cf. *Opper v. United States,* 348 U.S. 84; *Krulewitch v. United States,* 336 U.S. 440. This type of prejudicial effect is acknowledged to inhere in criminal practice, but it is justified on the grounds that (1) the jury is expected to follow instructions in limiting this evidence to its proper function, and (2) the convenience of trying different crimes against the same person, and connected crimes against different defendants, in the same trial is a valid governmental interest." 385 U.S. at 562.

> "Cases in this Court have long acted on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. See, *e.g., Tumey v. Ohio,* 273 U.S. 510;

Betts v. Brady, 316 U.S. 455; cf. *Gideon v. Wainwright,* 372 U.S. 335; see *Estes v. Texas,* 381 U.S. 532; *Sheppard v. Maxwell,* 384 U.S. 333; cf. *Griffin v. Illinois,* 351 U.S. 12. But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority. In the face of the legitimate state purpose and the long-standing and widespread use that attend the procedure under attack here, we find it impossible to say that because of the possibility of some collateral prejudice the Texas procedure is rendered unconstitutional under the Due Process Clause as it has been interpreted and applied in our past cases. As Mr. Justice Cardozo had occasion to remark, a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.' *Snyder v. Massachusetts,* 291 U.S. 97, 105. See also *Bucharter v. New York,* 319 U.S. 427.

"Petitioners' reliance on *Jackson v. Denno,* 378 U.S. 368, is misplaced. There the court held unconstitutional the New York procedure leaving to the trial jury alone the issue of the voluntariness of a challenged confession, an area of law that has been characterized by the development of particularly stiff constitutional rules. See *Rogers v. Richmond,* 365 U.S. 534; *Miranda v. Arizona,* 384 U.S. 436. The court held that a judicial ruling was first required to determine whether as a matter of law—federal constitutional law—the confession could be deemed voluntary.

This requirement of a threshold hearing before a judge on the federal question of voluntariness lends no solid support to the argument made here —that a two-stage jury trial is required whenever a State seeks to invoke an habitual-offender statute. It is true that the court in *Jackson* supported its holding by reasoning that a general jury verdict was not a 'reliable' vehicle for determining the issues of voluntariness because jurors might have difficulty in separating the issues of voluntariness from that of guilt or innocence. But the emphasis there was on protection of a specific constitutional right, and the *Jackson* procedure was designed as a specific remedy to ensure that an involuntary confession was not in fact relied upon by the jury. In the procedures before us, in contrast, no specific federal right—such as that dealing with confessions—is involved; reliance is placed solely on a general 'fairness' approach. In this area the court has always moved with caution before striking down state procedures. It would be extravagant in the extreme to take *Jackson* as evincing a general distrust on the part of this Court of the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper instructions by the judge in a criminal case, or as standing for the proposition that limiting instructions can never purge the erroneous introduction of evidence or limit evidence to its rightful purpose. Compare *Opper v. United States,* 348 U.S. 84; *Leland v. Oregon,* 343 U.S. 790. [Footnote omitted.]" 385 U.S. at 563-65.

II

ALTHOUGH THIS RULE OF EVIDENCE HAS SINCE BEEN CHANGED IN CALIFORNIA, THIS COURT SHOULD RESPECT CALIFORNIA'S DETERMINATION NOT TO GIVE THE CHANGE RETROACTIVE APPLICATION.

In 1965, the California Supreme Court in *People v. Aranda*, 63 Cal.2d 518, 47 Cal. Rptr. 353, 407 P.2d 265 (1965), changed the rule of evidence in effect at the time of petitioner's conviction and established a rule which permits the introduction in evidence of an extrajudicial statement by one defendant at a joint trial only if all parts of the statement implicating any codefendants are effectively deleted. In so doing, the California court noted that it acted not under constitutional compulsion but rather by way of declaring a rule of practice to implement a state Penal Code section.

> "In section 1098 of the Penal Code, the Legislature, while providing that the courts might order separate trials for defendants jointly charged with any public offense, left to the courts the determination of standards governing such severances. The grave constitutional doubts [footnote omitted] engendered by our present practice of permitting joint trials when the confession of one defendant implicates codefendants has prompted our reconsideration of this practice. Whether or not it is constitutionally permissible, the practice is prejudicial and unfair to the nondeclarant defendant and must be altered.
>
> " '[I]n criminal actions, where life or liberty is at stake, courts should not adhere to precedents unjust to the accused. It is never too late to

mend.' *(United States v. Delli Paoli* (2d Cir.) 229 F.2d 319, 323 [Frank, J., dissenting].)

"In the absence, however, of a holding by the United States Supreme Court that the due process clause requires such change, the rules we now adopt are to be regarded, not as constitutionally compelled, but as judicially declared rules of practice to implement section 1098. [Footnote omitted.]" 63 Cal.2d at 529-30.

Subsequently, the California Supreme Court had occasion to consider whether the rule established by it in *Aranda* should be given retroactive application. In *People v. Charles,* 66 Cal.2d 330, 333, 57 Cal.Rptr. 745, 425 P.2d 545 (1967), the court stated:

"The rules outlined in *Aranda* were designed to alter a practice which we deemed unfair to defendants who were implicated by the out-of-court declarations of their codefendants. We recognized that the prevailing practice rested upon the unrealistic hypothesis that the finder of fact could consider such declarations in determining the guilt or innocence of the declarant but ignore them in deciding the guilt or innocence of a codefendant. Our ruling, however, did not stem from a belief that the former procedure created a grave risk of convicting innocent defendants, and we were careful to point out that the rules announced were at least not yet constitutionally compelled. *(People v. Aranda, supra,* 63 Cal.2d at p. 530.) The purposes of *Aranda* thus do not require its application to convictions long since final. *(Cf. People v. Rollins, supra,* 65 Cal.2d 681, 685; *In re Lopez* (1965) 62 Cal.2d 368, 376-378 [42 Cal.Rptr. 188, 398 P.2d 380].)" 66 Cal.2d at 333.

We submit that California's decision to deny retroactive application to the change in law effected by *Aranda* presents no federal question. Indeed, this Court has similarly denied retroactive application to decisions establishing new constitutional standards. *Stovall v. Denno*, 388 U.S. 293 (1967); *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Tehan v. Shott*, 382 U.S. 406 (1966); *Linkletter v. Walker*, 381 U.S. 618 (1965).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Dated, San Francisco, California,
April 8, 1968.

THOMAS C. LYNCH,
Attorney General of the State of California,
ALBERT W. HARRIS, JR.,
Assistant Attorney General of the State of California,
DERALD E. GRANBERG,
Deputy Attorney General of the State of California,
Attorneys for Respondent.